88-695

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

—o—

CLIVE MILLER, a Member of the Morongo Band of Mission Indians,

Petitioner,

vs.

MORONGO BAND OF MISSION INDIANS,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether the "arising under" language of 28 U.S.C. § 1362 is broader than the identical language found in 28 U.S.C. § 1331.

2. Whether an Indian Band's interpleader action against petitioner, a member of the Band, and a California tax authority arises under federal law, within the meaning of 28 U.S.C. § 1362, where the complaint alleges that the sole dispute between the adverse claimants is whether 25 U.S.C. § 410 bars the State's levy on rent money the Band owes petitioner.

3. Whether the district court properly granted leave to file an amended complaint because the original complaint's allegations of jurisdiction were substantial and the alleged defects were correctable.

LIST OF ALL PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the California State Board of Equalization was a party to the proceeding.

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CLIVE MILLER, a Member of the Morongo Band of Mission Indians,

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vs.

MORONGO BAND OF MISSION INDIANS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Clive Miller prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit and entered September 20, 1988.

OPINIONS BELOW

The Court of Appeals filed its order and amended opinion on September 20, 1988. The opinion is not yet reported and is set forth as Appendix A.

On March 26, 1987, the District Court for the Northern District of California entered its order on cross mo-

tions for summary judgment (Appendix B), and on the same day entered its summary judgment (Appendix C).

JURISDICTION

The judgment and amended opinion of the Court of Appeals for the Ninth Circuit was filed September 20, 1988. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, § 2 of the Constitution provides in relevant part:

> The Judicial Power shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States and treaties made, or which shall be made under their authority . . . .

Title 28 U.S.C. § 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Title 28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28 U.S.C. § 1353 provides in relevant part:

> The District Court shall have original jurisdiction of any civil action involving the rights of any per-

> son in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty . . . .

Title 25 U.S.C. § 410 provides:

> No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

Title 25 U.S.C. § 345 provides in relevant part:

> All persons who are in whole or in part or Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant) . . . .

Fed. R. Civ. P. 22 provides in relevant part:

> (1) Persons having claims against the plaintiff may be joined as defendants and required to in-

terplead when their claims are such that the plaintiff is or may be exposed to double or multiply liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

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STATEMENT OF THE CASE

On December 28, 1983, the Morongo Band of Mission Indians (Band) filed a complaint in the United States District Court for the Northern District of California under Fed. R. Civ. P. 22 invoking the court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1335, 1353, 1362, 2201, 2202, and 25 U.S.I. § 345.

A. The complaint alleged the following facts. The Band is a federally-recognized Indian Band, within the meaning of 28 U.S.C. § 1362, and the beneficial owner of unallotted trust lands within the Morongo Indian Reservation, located in California. Petitioner is an enrolled member of the Band, resides on its reservation, and is the beneficial owner of allotted parcels of trust land located within the reservation. On April 26, 1983, the Band and petitioner executed a written lease giving the Band the right to use a specified portion of petitioner's land to conduct Bingo

games. The lease provided that the Band would pay rent to petitioner from the proceeds of the games.

On or about August 16, 1983, in an effort to collect state cigarette taxes allegedly owed by petitioner, the California State Board of Equalization (the "State" or the "Board") served the Band with a notice of levy on all property in the Band's possession belonging to petitioner, including funds being held by the Band as rent. Petitioner advised the Band that he believed 25 U.S.C. § 410 and the doctrine of federal preemption of the field of the leasing of Indian trust allotments prohibited the application of the levy to the rent payments owed to him and that the Band should not respond to the levy, but should turn over the rents to him. On October 19, 1983, the Band advised the State that it believed 25 U.S.C. § 410 to be applicable to the rent payments owed to petitioner. When the State threatened to enforce the levy unless the Band turned over the money to it, the Band filed the interpleader action and deposited the funds in the Registry of the District Court. The Band prayed that the District Court order the petitioner and the State to settle between themselves their rights to the rents due, and to discharge the Band from all liability with respect to the rent payments it owed petitioner.

Subsequently the Band reversed itself and moved the District Court for an order for leave to file an amended complaint which would have changed its position, to assert that it was entitled to the funds deposited with the District Court. Following the initial denial of this motion on June 7, 1985, petitioner and the State resolved the case as between them and submitted a proposed stipulated judgment

to the Court. The Court did not accept the proposed judgment. Instead it granted the Band leave to file a renewed motion to amend, which was granted on September 26, 1986.

B. The amended complaint consisted of an interpleader claim and three claims for declaratory relief, all arising under federal law, including federal common law. The State filed an answer to the amended complaint, and petitioner filed an answer and cross-complaint. The District Court then resolved the matter on cross motions for summary judgment. (App. B) Petitioner was awarded the funds deposited on his counterclaim, and the Band was awarded summary judgment on its claim that the lease was invalid because it had not been approved by the Secretary of the Interior.

C. After full briefing, but before oral argument, the Court of Appeals filed an order on April 28, 1988 requesting the parties to file a supplemental brief discussing whether the district court had subject matter jurisdiction over the case, posing the following questions:

1. Is subject matter jurisdiction in an interpleader action determined on the basis of plaintiff's complaint or by considering the coercive actions that could have been filed by the defendants against the plaintiff had the plaintiff not sought anticipatory relief by instituting the interpleader action? *See Bell & Beckwith v. USA*, 766 F.2d 910, 914, (6th Cir. 1985) ("In interpleader actions as in declaratory judgment actions, federal question jurisdiction exists if such jurisdiction would have existed in a coercive action by the defendant."); *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 209 F.2d 467, 473-74 (9th Cir. 1953).

2. If subject matter jurisdiction in an interpleader action is determined on the basis of plaintiff's

complaint, does the interpleader claim set forth in the Morongo Band's First Amended Complaint arise under federal law?

3. If subject matter jurisdiction in an interpleader action is determined by considering the coercive actions that could have been filed by the defendants against the plaintiff, do the coercive actions that could have been filed by Miller and the Board against Morongo Band arise under federal law?

All of the parties contended that the District Court had jurisdiction. The Court of Appeals disagreed and held that the District Court lacked subject matter jurisdiction over the original complaint, and that all its orders, including its order permitting the filing of an amended complaint, were void.

The Ninth Circuit held that subject matter jurisdiction did not exist under 28 U.S.C. §§ 1331 or 1362 because the cause allegedly did not "arise under" federal law. To reach this result the Ninth Circuit disregarded as surplusage the complaint's allegation that 25 U.S.C. § 410 barred the state's levy, explaining:

> Once we disregard the Band's superfluous allegations, we find the complaint insufficient to raise a federal question. The Band claims for *itself* no right or immunity under any federal law, nor does it allege a federal cause of action. [App. A-20, (Emphasis in original)].

The Court declined to interpret the "arising under" language in § 1362 more broadly than the same language in § 1331, and rejected petitioner's claim that the District Court had jurisdiction because he could have filed

a coercive action against the Band and against the State "arising under" federal law.

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REASONS FOR GRANTING THE WRIT

The Court should grant the writ because the case involves important issues concerning the rights of an American Indian who seeks to have a federal court interpret a federal statute enacted for his benefit.

After the District Court awarded the interpleaded funds to petitioner, the Ninth Circuit vacated the judgment holding that the District Court did not have jurisdiction over the action. In doing so, the Ninth Circuit declined to interpret the "arising under" language of 28 U.S.C. § 1362 more broadly than the same language found in 28 U.S.C. § 1331. Heretofore the Court has recognized this as an open question.

Another reason for granting the writ is the existing confusion in the appellate courts as to the proper reach of an interpleader action filed pursuant to Fed. R. Civ. P. 22.

I.

THE "ARISING UNDER" LANGUAGE OF 28 U.S.C. § 1362 IS BROADER THAN THE IDENTICAL LANGUAGE FOUND IN 28 U.S.C. § 1331

The Court should grant the writ because the case raises the important question whether Congress in enacting § 1362 intended to grant an Indian Band, with a governing body duly recognized by the Secretary of the Interior, greater access to the District Court than the Band would have under § 1331, by expanding its "arising under" jurisdiction. The Court acknowledged the existence of the question in *Oneida Indian Nation of N.Y. St. v. County of Oneida, N.Y.*, 414 U.S. 661, 682 n.16 (1974), stating:

> [W]e have no occasion to address and do not reach the contention pressed by petitioners that the Congress, in enacting § 1362 in 1966, 80 Stat. 890, intended to expand the scope of "arising under" jurisdiction in the district court beyond what judicial interpretations of that language would have allowed under § 1331, for that category of suits brought by Indian tribes . . . .

Petitioner contends that in light of the government's special concern in relation to the American Indian, the "arising under" language of § 1362 should be given a broader meaning than it receives under § 1331 and should be given the same broad meaning the identical language enjoys under Art. III, § 2 of the Constitution. The constitutional language has been construed as permitting Congress to extend federal jurisdiction to any case of which federal law potentially "forms an ingredient." *Franchise Tax Bd. v. Const. Laborers Vac. Trust*, 463 U.S. 1, 8 n.8 (quoting *Osborne v. Bank of United States*, 9 Wheat. 738, 823 (1824)).

There is no policy reason for not giving a duly recognized Indian Band access to federal court to the full extent

permitted by the Constitution. On the contrary the Court has always applied a canon of construction that statutes involving Indian interests are to be construed in favor of the Indians. *See, e.g., Bryan v. Itasca County,* 426 U.S. 373, 392 (1976); *Washington v. Yakima Indian Nation,* 439 U.S. 463, 484 (1979); *Northern Cheyenne Tribe v. Hallowbreast,* 425 U.S. 649, 655 n.7 (1976) (in which the Court referred to the rule as "this eminently sound and vital canon").

From a practical point of view there is no reason to believe that giving a broad construction to the "arising under" language of § 1362 will result in an undue burden on the federal courts.

II.

THE BAND'S INTERPLEADER ACTION AGAINST PETITIONER, A MEMBER OF THE BAND, AND THE STATE ARISES UNDER FEDERAL LAW WITHIN THE MEANING OF 28 U.S.C. § 1362 BECAUSE THE SOLE DISPUTE BETWEEN THE ADVERSE CLAIMANTS IS WHETHER 25 U.S.C. § 410 BARS THE STATE'S LEVY ON RENT MONEY THE BAND OWES PETITIONER.

The original complaint alleges that the sole dispute between petitioner and the State is whether the State's levy was barred by 25 U.S.C. § 410. If the "arising under" language of § 1362 were given the broad meaning suggested above, the District Court plainly had jurisdiction over the action. It also had jurisdiction under the Ninth Circuit's narrow construction of § 1362.

In *St. Louis U. Trust Co. v. Stone,* 570 F.2d 833 (8th Cir. 1978) there was a dispute between the Internal Revenue Service and a taxpayer concerning funds held by a trust company. Faced with conflicting claims, the company brought an interpleader action pursuant to Rule 22 seeking an injunction restraining the government from enforcing its levies against the trust company pending resolution of the dispute, and an order declaring the trust company's rights and duties under its escrow agreement.

The District Court granted the government's motion to dismiss the interpleader action for lack of jurisdiction. The Eighth Circuit reversed holding that jurisdiction existed under § 1331. The Court stated that because the operation of government tax liens involves federal law, it "necessarily follows that there is federal jurisdiction to decide such questions." *Id.* at 835.

Bell & Beckwith v. United States, 766 F.2d 910 (6th Cir. 1985) disagreed with *Stone* stating:

> To the extent that our result deviates from the result or analysis in *Stone* we decline to follow the Eighth Circuit's decision.

Id. at 916 n.1.

Bell & Beckwith analogized an interpleader action filed pursuant to Rule 22 to a declaratory judgment action, stating that federal jurisdiction exists only if any possible suit by claimants against the stakeholder, or by claimants

against each other, necessarily involved resolution of a federal question. After looking at all possible suits, the Sixth Circuit concluded that there was no jurisdiction, because the only controversy was between the two adverse claimants, and that dispute "was purely a question of state law." *Id.* at 916. The plain implication of *Bell & Beckwith* is that federal jurisdiction would exist if the dispute was purely a question of federal law.

The Ninth Circuit purported to follow *Bell & Beckwith*, disregarding the fact that the dispute between petitioner and the State was solely a question of federal law. The Ninth Circuit examined *some* of the coercive actions anticipated by the Band's complaint and concluded, mistakenly, that petitioner could not file any coercive action involving federal law. In reality petitioner could have filed an injunction action against a state official in his individual capacity to enjoin enforcement of the state's levy in violation of § 410. *See St. Louis U. Trust Co. v. Stone, supra.* Similarly, petitioner could have filed an injunction against a Band member acting in his individual capacity, to enjoin the Band from honoring the state's levy in violation of § 410.

Federal question jurisdiction exists in this case because petitioner could have filed a coercive action against both the Band and the State under federal law.

III.

THE DISTRICT COURT PROPERLY GRANTED LEAVE TO FILE AN AMENDED COMPLAINT BECAUSE THE ORIGINAL COMPLAINT'S ALLEGATIONS OF JURISDICTION WERE SUBSTANTIAL AND THE ALLEGED DEFECTS WERE CORRECTABLE.

The Ninth Circuit did not assert that the first amended complaint did not arise under federal law. Rather, it held that the District Court had no jurisdiction over the original complaint and therefore had no power to grant leave to file an amended complaint. The Ninth Circuit acknowledged that if there were proper jurisdiction over the Band's original complaint, the District Court had the power to grant leave for the Band to file its amended complaint and to consider any additional jurisdictional claims presented therein. App. A-12, n.3.

The Ninth Circuit cited only one case from this Court to support its holding that a District Court is without power to grant leave to amend if there was no jurisdiction under the original complaint. *Mollen v. Torrence*, 22 U.S. (9 Wheat.) 536, 538 (1824). *Mollen* was an action on a note, with jurisdiction based on diversity. At the time of the filing of the suit, plaintiff and defendant were citizens of different states, but, during the pendency of the action they had both become citizens of the same state. The Court held that once subject matter jurisdiction vested because of diversity, subsequent events would not require the matter to be dismissed for lack of jurisdiction. The Court did not

address the effect to be given an amended complaint filed in an action in which the district court originally lacked subject matter jurisdiction.

The Ninth Circuit rejected petitioner's claim of jurisdiction pursuant to § 1335 on the ground, *inter alia,* that the members of the state taxing authority were sued in their "official capacity." App. A-15, n.5. The Band could have sued them in their individual capacity, thus giving the district court jurisdiction under § 1335. *See Treinies v. Sunshine Mining Co.,* 308 U.S. 66 (1939) and *State Farm Fire & Casualty Co. v. Tashire,* 386 U.S. 523 (1967). The district court had power to grant leave to amend the defective allegation. 28 U.S.C. § 1653.

On its face the complaint arose under federal law. The Ninth Circuit found the complaint insufficient only after it disregarded as "surplusage" the allegations concerning § 410. App. A-18. Assuming *arguendo* that the Ninth Circuit correctly disregarded all reference to § 410, the allegation nevertheless gave the District Court sufficient jurisdiction to permit an amendment. See the dissenting views in *Field v. Volkswagenwerk AG,* 626 F.2d 293, 309-310 (3rd Cir. 1980) (§ 1653 should be liberally applied, for the purpose of avoiding dismissals that result only in the refiling of a properly amended complaint).

The District Court properly granted leave to file an amended complaint because the original complaint's allegations of jurisdiction were substantial and the defects were correctable.

CONCLUSION

For the aforesaid reasons, the Court should grant the writ of certiorari to the United States Court of Appeals.

Respectfully submitted,

DAVID M. LIBERMAN

Attorney for Petitioner

Dated: October, 1988

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MORONGO BAND OF MISSION INDIANS, *Plaintiff/Counterclaim-Defendant/Appellant,* v. CALIFORNIA STATE BOARD OF EQUALIZATION; RICHARD NEVINS, in his official capacity as Chairman of the State Board of Equalization; CONWAY H. COLLIS, in his official capacity as a member of State Board of Equalization; ERNEST J. DRONENBURG, JR., in his official capacity as a member of the State Board of Equalization; WILLIAM M. BENNETT, in his official capacity as a member of the State Board of Equalization, *Defendants/Appellees,* CLIVE MILLER, *Defendant/Counterclaimant/Appellee.*	No. 87-2320 D.C. No. CV-83-6190-SC

MORONGO BAND OF MISSION INDIANS, *Plaintiff/Counterclaim-Defendant/Appellee,* v. CALIFORNIA STATE BOARD OF EQUALIZATION, et al., *Defendants,* and CLIVE MILLER, *Defendant/Counterclaimant/Appellant.*	No. 87-2371
MORONGO BAND OF MISSION INDIANS, *Plaintiff/Appellee,* v. CALIFORNIA STATE BOARD OF EQUALIZATION, *Defendant Appellant.*	No. 87-2393 ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California (San Francisco)
Samuel Conti, District Judge, Presiding

Argued and Submitted
May 10, 1988—San Francisco, California

Filed June 14, 1988
Amended September 20, 1988

Before: James R. Browning, Arthur L. Alarcon and
William A. Norris, Circuit Judges.

Opinion by Judge Alarcon

SUMMARY

Jurisdiction/Courts and Procedure/Indians

Appeal from judgment. Vacated and remanded with instructions to dismiss. The court held that the district court improperly exercised subject matter jurisdiction over an Indian tribe's action in the nature of interpleader against a member of the tribe and a state tax authority.

Plaintiff Morongo Band of Mission Indians leased Indian trust land beneficially owned by defendant band member Clive Miller. Defendant California State Board of Equalization levied on funds held by the Band and allegedly owed to Miller as rent under the lease. The Band deposited the disputed funds into the district court and instituted an action in the nature of interpleader. The Band amended its complaint to assert its own claim to the funds. Miller thereupon filed a counterclaim alleging claims for unpaid rent. The district court granted summary judgment for the Band on its claim that the lease was invalid. The court also granted summary judgment

for Miller on his claim for the reasonable value of the Band's use of his property. All parties appealed.

[1] In determining federal court jurisdiction, the court looks to the original complaint. [2] The complaint originally filed by the Band alleged one claim—interpleader. [3] Contrary to the Band's assertion, jurisdiction is unavailable under the Federal Interpleader Act, 28 U.S.C. § 1335. That section requires that two or more of the adverse claimants to the interpleaded funds be of diverse citizenship. An an agency of the State of California, the Board has no citizenship for the purposes of section 1332. A suit between a State and a citizen is not between citizens of different States. Hence, the adverse claimants—Miller and the Board—are not of diverse citizenship. [4] Section 345 provides jurisdiction over cases in which an Indian's interest in allotted trust land is at issue. Similarly, 28 U.S.C. § 1353 confers the district courts with jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty. [5] Characterizing the deposited funds as "rents due to MILLER," the complaint assumed the validity of Miller's interest and his authority to enter into a lease with respect to that interest. The sections therefore, are inapplicable. [6] The Band is also precluded from grounding jurisdiction on the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. The Act creates a remedy in cases otherwise within the court's jurisdiction; it does not constitute an independent basis for jurisdiction. [7] Under 28 U.S.C. §§ 1331 and 1362, jurisdiction depends on whether the Band's interpleader action arises under federal law. [8] An action arises under federal law if that law creates the cause of

action or if a substantial question of federal law is a necessary element of plaintiff's cause of action. The federal-law element must appear on the face of plaintiff's *well-pleaded* complaint. [9] As a result of the well-pleaded complaint rule, few interpleader complaints have been found to qualify for federal question jurisdiction. [10] The Band's allegations regarding section 410 and the pre-emption doctrine must be disregarded in assessing whether the complaint supports federal jurisdiction because they are surplusage. [11] Nor is jurisdiction proper under 28 U.S.C. § 1331. Had the Band not instituted the present action, Miller would have sought recovery of the disputed rents by instituting an action against the Band for breach of lease. Breach of lease is a cause of action under state, not federal, law. The Band's likely federal-law defenses would not be part of Miller's well-pleaded complaint for breach of lease and, thus, would not support federal jurisdiction over Miller's state-law claim. [12] Moreover, the Band's interpleader action also anticipated a coercive action by the Board to enforce its tax levy against rent owed to Miller in the possession of the Band. The anticipated enforcement action would not arise under federal law.

COUNSEL

George Forman, Alexander & Karshmer, Berkeley, California, for the plaintiff/counterclaim-defendant/appellant: appellee Morongo Band of Mission Indians.

Julian O. Standen, Assistant Attorney General, San Francisco, California, for the defendants/appellant/appellees California State Board of Equalization.

Robert C. Moest, Fisher & Moest, Los Angeles, California, for the defendant / counterclaimant / appellant / appellee Clive Miller.

ORDER

The opinion filed in this case on June 14, 1988 is hereby amended in the following respects:

1. Slip op. at 6979, second paragraph, line 15—change the semi-colon after "(1974)" to a period and add the following footnote after the period:

> The only case cited by Miller in which the court analyzed whether jurisdiction existed on the basis of an amended complaint is *Boelens v. Redman Homes, Inc.*, 759 F.2d 504 (5th Cir. 1985) [*Boelens II*]. In *Boelens,* the original complaint alleged four claims which appeared to arise under federal law. Plaintiffs later amended their complaint to eliminate all but one of such claims, and the case proceeded to trial. On appeal from the final judgment, the Fifth Circuit ruled that plaintiffs' remaining claim did not support federal jurisdiction. *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1071 (5th Cir. 1984) [*Boelens I*]. The court remanded the case with directions that it be dismissed for lack of subject matter jurisdiction. *Id.* On petition for rehearing, the court rejected plaintiffs' argument that jurisdiction should have been determined by the original, not the amended, complaint. *Boelens II*, 759 F.2d at 507-08.
>
> The principal distinction between this matter and *Boelens* is that in *Boelens,* the Fifth Circuit concluded that while the district court had jurisdiction at the outset, it was lost because the plaintiff voluntarily amended the complaint. In the present case, the district court *lacked* jurisdiction at the outset. Moreover, *Boelens* in no way conflicts with our ruling that a district court is powerless to grant leave to amend

when it lacks jurisdiction over the original complaint. In fact, *Boelens* fully supports our conclusion. The Fifth Circuit held that the district court should have ordered dismissal because the amended complaint failed to support federal jurisdiction. *Boelens I*, 748 F.2d at 1071; *see also Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1065 (9th Cir. 1979) (where complaint filed in state court action that was later removed to federal court failed to state a federal question, "no federal jurisdiction existed to entertain a later amendment to the complaint").

2. Slip op. at 6979, second paragraph, lines 15-20—Delete the citation to *Boelens*.

3. Slip op. at 6989 n.7—Add the following at the end of footnote 7:

Miller argues that his coercive action would have arisen under 25 U.S.C. § 345 and 28 U.S.C. § 1353. As noted above, these sections confer the district courts with jurisdiction over suits in which an Indian's interest in allotted trust land is at issue. Slip op. at 11869. These sections do not authorize jurisdiction over an action to recover rents owing under a lease of a building, even when the building happens to sit on allotted trust land. The cases on which Miller relies are distinguishable in that each was an action to protect an Indian's right to, or interest in, allotted trust land. *See Begay v. Albers*, 721 F.2d 1274, 1276 (10th Cir. 1983) (suit by individual Indians to cancel certain allegedly forged deeds purporting to convey their fee interests in allotted tracts; plaintiffs sought recovery of possession and an order quieting their beneficial title); *Loring v. United States*, 610 F.2d 649, 650 (9th Cir. 1979) (suit by individual Indians seeking compensation for right-of-way over their allotted lands taken by federal government and municipality; federal statutes protected Indian allottees from improvident grants of rights-of-way); *Scholder v.*

United States, 428 F.2d 1123, 1129 (9th Cir.) (suit by individual Indians seeking injunctive relief to prevent federal government from charging against the Indians' trust lands the costs of constructing a lateral irrigation line; charges amounted to a lien on the lands, which impaired Indians' interests therein), *cert. denied*, 400 U.S. 942 (1970).

Our understanding of the scope of jurisdiction conferred by §§ 345 and 1353 is confirmed by the Supreme Court's pronouncement on the subject in *United States v. Mottaz*, 476 U.S. 834 (1986). The Court in *Mottaz*, citing *Scholder*, declared that § 345 contemplates two types of suits: those seeking the issuance of an allotment, and those involving an Indian's interest in or right to an allotment once he has acquired it. *Id.* at 845. Miller's coercive action against the Band would have fallen into neither category.

In *Keechi v. United States*, 604 F. Supp. 267 (D.D.C. 1984), also cited by Miller, the court ruled it had jurisdiction under §§ 345 and 1353 over an individual Indian's suit seeking to prevent the IRS from enforcing a levy on royalties derived from an oil and gas lease of plaintiff's allotted trust land. To the extent *Keechi* can be read to mean that §§ 345 and 1353 provide a basis for jurisdiction over any suit in which an Indian seeks to collect or preserve income derived from leases of allotted trust lands, the opinion is inconsistent with the foregoing authorities. *Keechi*, however, need not be read so broadly. The funds at issue there were not rents due under the lease of a capital improvement but royalties earned from oil production, an activity that depletes the land's resources and, thus, reduces the value of the allottee's interest in the land.

4. Renumber footnotes as necessary in light of the foregoing revisions.

The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en

banc filed by Appellee and Cross-Appellant Clive Miller. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

ALARCON, Circuit Judge:

I. INTRODUCTION

The question presented in this case is whether the district court properly exercised subject matter jurisdiction over an Indian tribe's action in the nature of interpleader against a member of the tribe and a state tax authority. We hold that it did not. Accordingly, we vacate the district court's judgment in all respects and remand with instructions that the case be dismissed.

II. BACKGROUND

Plaintiff/Counterclaim-Defendant/Appellant/Cross/Appellee Morongo Band of Mission Indians (the Band) leased Indian trust land beneficially owned by Defendant:Counterclaimant/Appellee/Cross-Appellant Clive Miller (Miller), a member of the Band. The lease was never approved by the Secretary of the Interior (the Secretary).

On August 16, 1983, Defendant/Appellee/Cross-Appellant California State Board of Equalization (the Board) levied on funds held by the Band and allegedly owed to Miller as rent under the lease. On December 28, 1983, the Band deposited the disputed funds into the registry of the district court and instituted an action in the nature of in-

terpleader. The Band asserted no claim to the deposited funds.

On September 26, 1986, the district court granted the Band leave to amend its complaint to assert its own claim to the funds under the theory that the lease with Miller was invalid for lack of approval by the Secretary.[1] Miller thereupon filed a Counterclaim alleging claims for unpaid rent under the lease, for the reasonable value of the Band's use of his property, for bad faith, and for violations of the Indian Civil Rights Act, 25 U.S.C. § 1302.

The district court granted summary judgment for the Band on its claim that the lease was invalid. The court also granted summary judgment for Miller on his claim for the reasonable value of the Band's use of his property. All parties appealed.

The briefs initially filed in this court did not discuss the question of federal subject matter jurisdiction over interpleader actions. We called for supplemental briefing on the question. Each of the parties contends that the district court properly exercised jurisdiction pursuant to the general federal question statute, 28 U.S.C. § 133 (1982).

III. ANALYSIS

The fact that none of the parties contests the district court's jurisdiction does not, of course, relieve us of our responsibility to determine whether the court's exercise of jurisdiction was proper. The parties have no power to

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[1]The Band was required to obtain leave of court before filing its amended complaint because the defendants had long before answered the original complaint. *See* Fed. R. Civ. P. 15(a).

confer jurisdiction on the district court by agreement or consent. *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1374 (9th Cir.), *cert. denied*, 108 S.Ct. 150 (1987); *Janakes v. United States Postal Service*, 768 F.2d 1091, 1095 (9th Cir. 1985). If the district court had no jurisdiction over the subject matter, the action should have been dismissed, regardless of the parties' preference for an adjudication in federal court.

[1] The district court, believing that it had jurisdiction based on the original interpleader claim, granted the Band leave to file an amended complaint realleging the interpleader claim and adding three claims for declaratory relief. In determining federal court jurisdiction, we look to the original rather than to the amended complaint. Subject matter jurisdiction must exist as of the time the action is commenced. *See Mullen v. Torrance*, 22 U.S. (9 Wheat.) 536, 538 (1824) (jurisdiction "depends upon the state of things at the time of the action brought"); *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 248 (7th Cir. 1981) ("Jurisdictional questions are answered by reference to the time of the filing of an action . . . ."), *cert. denied*, 455 U.S. 993 (1982); *Mobil Oil Corp. v. Kelley*, 493 F.2d 784, 786 (5th Cir.) (jurisdiction "is determined at the outset of the suit"), *cert. denied*, 419 U.S. 1022 (1974).[2] If jurisdiction

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[2]The only case cited by Miller in which the court analyzed whether jurisdiction existed on the basis of an amended complaint is *Boelens v. Redman Homes, Inc.*, 759 F.2d 504 (5th Cir. 1985) [*Boelens II*]. In *Boelens*, the original complaint alleged four claims which appeared to arise under federal law. Plaintiffs later amended their complaint to eliminate all but one of such claims, and the case proceeded to trial. On appeal from the final judgment, the Fifth Circuit ruled that plaintiffs' remain-

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is lacking at the outset, the district court has "no power to do anything with the case except dismiss." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3844, at 332 (1986) (footnote omitted); *accord United States v. Boe*, 543 F.2d 151, 159 (C.C.P.A. 1976) (when subject matter jurisdiction is lacking, the district court "ha[s] no power to do anything, other than to dismiss the action," and any order other than to dismiss is a nullity).[3] Ac-

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ing claim did not support federal jurisdictio. *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1071 (5th Cir. 1984) [*Boelens I*]. The court remanded the case with directions for rehearing, the court rejected plaintiffs' argument that jurisdiction should have been determined by the original, not the amended, complaint. *Boelens II*, 759 F.2d at 507-08.

The principal distinction between this matter and *Boelens* is that in *Boelens*, the Fifth Circuit concluded that while the district court had jurisdiction at the outset, it was lost because the plaintiff voluntarily amended the complaint. In the present case, the district court *lacked* jurisdiction at the outset. Moreover, *Boelens* in no way conflicts with our ruling that a district court is powerless to grant leave to amend when it lacks jurisdiction over the original complaint. In fact, *Boelens* fully supports our conclusion. The Fifth Circuit held that the district court should have ordered dismissal because the amended complaint failed to support federal jurisdiction. *Boelens I*, 748 F.2d at 1071; *see also Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1065 (9th Cir. 1979) (where complaint filed in state court action that was later removed to federal court failed to state a federal question, "no federal jurisdiction existed to entertain a later amendment to the complaint").

[3]When the district court has jurisdiction over the action at the outset but the complaint inadequately alleges jurisdiction, the court may grant leave to amend the defective allegations. *See* 28 U.S.C. § 1653 (1982) ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."). Section 1653 provides a remedy for defective *allegations* only; "it does not provide a remedy for defective jurisdiction itself." *Field v. Volkswagenwerk AG*, 626 F.2d 293, 306

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cordingly, we must examine the Band's original complaint to determine whether the claim alleged therein was one over which the district court had jurisdiction. If jurisdiction was lacking, then the court's various orders, including that granting leave to amend the complaint, were nullities.

[2] The complaint originally filed by the Band alleged one claim—interpleader. The facts alleged to support the claim were as follows: The Band is a federally-recognized Indian tribe. It is the beneficial owner of unallotted trust lands within the Morongo Indian Reservation, which is located in Riverside County, California. Miller is a member of the Band and resides on its reservation. He is the beneficial owner of allotted parcels of trust land located within the reservation. On April 26, 1983, the Band and Miller executed a written lease giving the Band the right to use a specified portion of Miller's land to conduct bingo games. The lease provided that the Band would pay rent to Miller from the proceeds of the games. On or about August 16, 1983, in an effort to collect state cigarette taxes owed by Miller, the Board served the Band with a Notice of Levy on all property in the Band's possession belonging to Miller, including funds being held by the Band as rent. Miller subsequently demanded that the Band pay him the rent in question, contending that the rent was exempt from

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(3d Cir. 1980) (2-1); *accord Brennan v. University of Kansas*, 451 F.2d 1287, 1289 (10th Cir. 1971) (section 1653 empowers the courts to correct "defects of form, not substance") (footnote omitted). As we explain below ,the defect in the present case is one of substance—the case does not arise under federal law. The district court, therefore, had no power to grant the Band leave to amend its complaint.

the Board's levy under 25 U.S.C. § 410[4] and the doctrine of federal preemption of the field of leases of Indian trust land. Faced with conflicting claims to the rent, the Band deposited $292,000 into the registry of the district court and instituted the present action.

[3] In its complaint, the Band did not assert any right to the deposited funds. Rather, it characterized the funds as "rents due to MILLER for the months of September through December, 1983." By way of relief on its claim for interpleader, the Band prayed that the district court "[o]rder the defendants to interplead and settle between themselves their rights to the rents due under the said lease; . . . [o]rder that plaintiffs are discharged from all liability with respect to the rent payments deposited with the Court . . . ; [and] [o]rder that the rents deposited with the Court be paid to the party whom the Court shall adjudge entitled to them . . . ."

The complaint alleged subject matter jurisdiction under 28 U.S.C. §§ 345, 1331, 1335, 1353, 1362, 2201, and 2202. Contrary to the Band's assertion, jurisdiction is unavailable under the Federal Interpleader Act, 28 U.S.C. § 1335 (1982). That section requires that two or more of the adverse claimants to the interpleaded funds be "of diverse citizenship as defined in section 1332 of this title." 28

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[4]Section 410 provides, in pertinent part:

> No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period . . . except with the approval and consent of the Secretary of the Interior.

25 U.S.C. § 410 (1982).

U.S.C. § 1335(a)(1) (1982); *see State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967) (section 1335 "has been uniformly construed to require . . . diversity of citizenship between two or more claimants"). According to the Band's complaint, the Board "is an agency of the State of California charged by law with the assessment and collection of state taxes." As an agency of the State of California, the Board has no "citizenship" for the purposes of section 1332. *See Moor v. County of Alameda*, 411 U.S. 693, 717 (1973) ("There is no question that a State is not a 'citizen' for purposes of the diversity jurisdiction."); *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894) ("A State is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a State and a citizen or a corporation of another State is not between citizens of different States . . . ."). Hence, the adverse claimants—Miller and the Board—are not of diverse citizenship.[5]

In addition to section 1335, Fed. R. Civ. P. 22 provides for interpleader actions in the federal courts. Rule 22,

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[5]The Band also named as defendants certain individual members of the Board. Each of these individuals was expressly sued "in his official capacity as a member of the [Board]." A claim alleged against a state officer acting in his official capacity is treated as a claim against the state itself. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."); *Monell v. Department of Social Services*, 436 U.S. 658, 690 n.55 (1978) (official-capacity suits "represent only another way of pleading an action against an entity of which an officer is an agent"). We, therefore, disregard the citizenship of the individual Board members in assessing jurisdiction under section 1335. *See Northeast Federal Credit Union v. Neves*, 837 F.2d 531, 534 (1st Cir. 1988) (defendant state tax assessor, sued under section 1335 in his official capacity, "has *no* citizenship for jurisdictional purposes").

however, is merely a procedural device; it confers no jurisdiction on the federal courts. *Gelfgren v. Republic Nat'l Life Ins. Co.*, 680 F.2d 79, 81 (9th Cir. 1982); *see* Fed. R. Civ. P. 82 (federal rules shall not be construed to extend or limit subject matter jurisdiction). Accordingly, an interpleader action under Rule 22 must fall within some statutory grant of jurisdiction.[6] *Gelfgren*, 680 F.2d at 81; *St. Louis Union Trust Co. v. Stone*, 570 F.2d 833, 835 (8th Cir. 1978). We shall proceed to consider the statutory grants of jurisdiction on which the Band has sought to rely.[7]

[4] Excluding section 1335, which is inapplicable to the present case for the reasons discussed above, the Band alleged subject matter jurisdiction under 28 U.S.C. §§ 345, 1331, 1353, 1362, 2201, and 2202. Title 28 contains no section numbered 345. We assume that the Band intended to allege jurisdiction under 25 U.S.C. § 345. That section confers the district courts with jurisdiction over "any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of

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[6]The mere fact that an Indian tribe is a party to the action is insufficient to establish jurisdiction. *See* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3579, at 255 (1984) ("Although the federal government has long had a special relation to the American Indian, there is no jurisdiction in the federal courts to hear a case merely because an Indian or an Indian tribe is a party to it.") (footnote omitted).

[7]"Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 3233 n.6 (1986). Because the Band did not purport to base jurisdiction on 28 U.S.C. § 1332 (diversity of citizenship), we express no opinion as to whether jurisdiction would be proper under that section.

land under any law or treaty . . . .'' 25 U.S.C. § 345 (1982). In short, section 345 provides jurisdiction over cases in which an Indian's interest in allotted trust land is at issue. *See* F. Cohen, *Handbook of Federal Indian Law* 314 (1982) (''The basic requisite for jurisdiction [under 25 U.S.C. §§ 345-346] is an issue concerning Indian ownership of all or a portion of an allotment under federal restrictions.'') (footnote omitted). Similarly, 28 U.S.C. § 1353 confers the district courts with ''jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.'' 28 U.S.C. § 1353 (1982).

[5] The Band's complaint did not dispute Miller's interest in or entitlement to the leased premises. On the contrary, in characterizing the deposited funds as ''rents due to MILLER,'' the complaint assumed the validity of Miller's interest and his authority to enter into a lease with respect to that interest. Sections 345 and 1353, therefore, are inapplicable to the present case.

[6] The Band is also precluded from grounding jurisdiction on the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (1982 & Supp. III 1985). The Declaratory Judgment Act merely creates a remedy in cases otherwise within the court's jurisdiction; it does not constitute an independent basis for jurisdiction. *Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983) (per curiam).

[7] The remaining bases for jurisdiction alleged by the Band are 28 U.S.C. §§1331 and 1362. Section 1331 provides: ''The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.'' 28 U.S.C. § 1331

(1982). Section 1362 provides: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362 (1982). Under both sections, jurisdiction depends on whether the Band's interpleader action "arises under" federal law. *See Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714 (9th Cir. 1980) (declining to interpret "arising under" language in section 1362 more broadly than identical language in section 1331), *cert. denied*, 451 U.S. 911 (1981).

[8] The Supreme Court has explained that an action arises under federal law if that law creates the cause of action, *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), or if a substantial question of federal law is a necessary element of plaintiff's cause of action, *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199-202 (1921). Moreover, the Court has long and consistently held that the federal-law element must appear on the face of plaintiff's *well-pleaded* complaint. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983). This means that a plaintiff may not establish federal jurisdiction by asserting in its complaint that the defendant will raise a federal-law *defense* to the plaintiff's claim, *id.* at 13-14, or by including in its complaint allegations of federal-law questions that are not essential to its claim, *id.* at 10.

[9] As a result of the well-pleaded complaint rule, "few interpleader complaints have been found to qualify

for federal question jurisdiction. Interpleader is a procedural device available to a stakeholder to resolve a dispute that exists primarily between the defendant claimants. The stakeholder's claim is typically one seeking discharge and is difficult to characterize as asserting either federal or state rights." *Banco de Ponce v. Hinsdale Supermarket Corp.*, 663 F. Supp. 813, 816 (E.D.N.Y. 1987) (citation omitted). *But see St. Louis Union Trust Co.*, 570 F.2d at 835 (finding federal question jurisdiction over interpleader action in which plaintiff sought, *inter alia*, injunction against enforcement of federal tax lien).

[10] The Band's complaint alleges that Miller contends that the Board's levy is barred by 25 U.S.C. § 410 and by the doctrine of preemption, and that the Board argues to the contrary. These allegations are surplusage; they merely anticipate the arguments likely to be advanced by the defendants against each other. Neither section 410 nor the preemption doctrine forms any part of the Band's own well-pleaded claim. Accordingly, the foregoing allegations must be disregarded in assessing whether the complaint supports federal jurisdiction. *See Gardner v. Schaffer*, 120 F.2d 840, 842 (8th Cir. 194) (per curiam) (finding no federal question jurisdiction over interpleader action, notwithstanding plaintiff's allegation that defendant relied on federal statute in asserting claim to disputed funds); *Cowan v. United States*, 172 F. Supp. 291, 293-94 (S.D.N.Y. 1959) (finding no federal question jurisdiction over interpleader action, notwithstanding plaintiff's allegation that defendants' respective rights to interpleaded funds were governed by federal statute); *cf. Gelfgren*, 680 F.2d at 81 (where plaintiff's state court action was prop-

erly removed, federal court had jurisdiction over defendant's cross-complaint for Rule 22 interpleader).

Once we disregard the Band's superfluous allegations, we find the complaint insufficient to raise a federal question. The Band claims for *itself* no right or immunity under any federal law, nor does it allege a federal cause of action.

This does not, however, conclude our analysis. The Sixth Circuit, in a thorough and well-reasoned opinion, has examined the issue of federal question jurisdiction over interpleader actions under Rule 22. *See Bell & Beckwith v. United States,* 766 F.2d 910 (6th Cir. 1985). We find that court's analysis helpful, particularly because *Bell & Beckwith* involved facts similar to those underlying the present case. There, the Internal Revenue Service (IRS) levied on an account held by a stock-broker. The broker then instituted an interpleader action, naming as defendants the IRS and the party claiming ownership of the account. *Id.* at 911.

The Sixth Circuit observed that the complaint failed to assert a federal claim against the defendants. *Id.* at 912. The court noted, however, that "federal question jurisdiction exists in those cases in which the plaintiff's claim, though itself not raising a federal question, asserts a defense to a claim that would raise a federal question and that defendant could have asserted in a coercive action." *Id.* Recognizing that this principle has been invoked primarily in declaratory judgment actions, the court cogently explained why the principle should also apply to Rule 22 interpleader actions:

> [A] plaintiff may use an interpleader action [under Rule 22] to anticipate and accelerate a coercive action by the defendant. The issue to be adjudicated remains the same, but interpleader may be used "to reach an early and effective determination of disputed questions." 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1702 (1972). . . . Thus, the purpose of, and procedural advantage provided by, an interpleader action may be the same as that of the declaratory judgment action—the actions "enabl[e] a defendant to precipitate a plaintiff's suit in order to avoid multiple liability or other inconvenience." *Thomas v. Shelton*, 740 F.2d 478, 485 (7th Cir. 1984). In interpleader actions as in declaratory judgment actions, federal questions jurisdiction exists if such jurisdiction would have existed in a coercive action by the defendant.

Id. at 914.

In an interpleader action, as in an action for declaratory relief, the plaintiff seeks an adjudication of claims that the defendants threaten to assert against the plaintiff. Whether the action is styled as one for interpleader or for declaratory relief, the cause of action litigated is not that of the plaintiff but that of the defendants. *See Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1179 (5th Cir. 1984) (in an action for declaratory judgment("the underlying cause of action which is . . . actually litigated is the declaratory defendant's, not the declaratory plaintiff's"). Federal jurisdiction over both types of actions is proper if the cause(s) of action anticipated by the plaintiff's suit would arise under federal law. *Bell & Beckwith*, 766 F.2d at 914; *Banco de Ponce*, 663 F. Supp. at 817 ("[F]ederal question jurisdiction exists if at least one of the threatened actions fairly alleged in the interpleader complaint arises under federal law.").

Applying the foregoing principles to the case before it, the Sixth Circuit concluded that state law would have been determinative of each of the coercive actions anticipated by the interpleader claim. 766 F.2d at 915-16. Accordingly, the court ordered dismissal of the action for lack of jurisdiction. *Id.* at 917.

The First Circuit employed a similar analysis in *Northeast Fed. Credit Union v. Neves,* 837 F.2d 531 (1st Cir. 1988). There, the State of Maine levied on certain accounts on deposit in a New Hampshire-based credit union. Maine then instituted a state court action to enforce the levies. The credit union responded by instituting an interpleader action in the United States District Court for the District of New Hampshire, naming as defendants Maine's tax assessor and the owners of the accounts in question. *Id.* at 531-32. Plaintiff contended that a federal statute barred Maine from levying on the deposits. *Id.* at 532.

Because the claimants to the funds in question were not of diverse citizenship, jurisdiction was improper under section 1335. *Id.* at 534. The court proceeded to consider whether jurisdiction could be premised on section 1331. The court concluded that federal question jurisdiction was unavailable, because the federal questions asserted by the plaintiff were simply defenses to Maine's state-law claim for enforcement of the tax levy:

> [Plaintiff's] newly-emergent claim of federal right is nothing more than an anticipatory defense to Maine's state court action to enforce the levies. And it is settled beyond peradventure that federal question jurisdiction will not lie if the asserted federal right "is in reality in the nature of a defense to a threatened

> [state court] action." The rule has force whether the state court enforcement action is, as here, actually pending, or . . . merely "threatned." It applied to all suits—whether for declaratory or injunctive relief—which represent "a defensive maneuver" in response to a state court enforcement action. The federal courts cannot be used as a launching pad from which to "engage in a preemptive strike" aimed at exploring the state suit.

Id. at 535 (citations omitted).

To complete our analysis, therefore, we consider whether the coercive actions anticipated by the Band's complaint would arise under federal law. If so, jurisdiction is proper under section 1331.

[11] Had the Band not instituted the present action, Miller would have sought recovery of the disputed rents by instituting an action against the Band for breach of lease.[8] Breach of lease is a cause of action under state,

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[8]The Counterclaim filed by Miller in response to the Band's amended complaint alleged, *inter alia*, a violation of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302 (1982). The Board argues that such coercive claim arises under federal law, hence the district court had jurisdiction over the Band's action. Claims for damages are not cognizable under the ICRA. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476 (9th Cir. 1980). Even if Miller's claim were cognizable, it is not a claim to rent under the lease, hence it is not one of the coercive actions anticipated by the Band's interpleader claim.

Miller argues that his coercive action would have arisen under 25 U.S.C. § 345 and 28 U.S.C. § 1353. As noted above, these sections confer the district courts with jurisdiction over suits in which an Indian's interest in allotted trust land is at issue. Slip op. at 11869. These sections do not authorize jurisdiction over an action to recover rents owing under a lease of

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not federal, law. The fact that the lease was entered into under authority conferred by federal statutes would not

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a building, even when the building happens to sit on allotted trust land. The cases on which Miller relies are distinguishable in that each was an action to protect an Indian's right to, or interest in, allotted trust land. *See Begay v. Albers*, 721 F.2d 1274, 1276 (10th Cir. 1983) (suit by individual Indians to cancel certain allegedly forged deeds purporting to convey their fee interests in allotted tracts; plaintiffs sought recovery of possession and an order quieting their beneficial title); *Loring v. United States*, 610 F.2d 649, 650 (9th Cir. 1979) (suit by individual Indians seeking compensation for right-of-way over their allotted lands taken by federal government and municipality; federal statutes protected Indian allottees from improvident grants of rights-of-way); *Scholder v. United States*, 428 F.2d 1123, 1129 (9th Cir.) (suit by individual Indians seeking injunctive relief to prevent federal government from charging against the Indians' trust lands the costs of constructing a lateral irrigation line; charges amounted to a lien on the lands, which impaired Indians' interests therein), *cert. denied*, 400 U.S. 942 (1970).

Our understanding of the scope of jurisdiction conferred by §§ 345 and 1353 is confirmed by the Supreme Court's pronouncement on the subject in *United States v. Mottaz*, 476 U.S. 834 (1986). The Court in *Mottaz*, citing *Scholder*, declared that § 345 contemplates two types of suits: those seeking the issuance of an allotment, and those involving an Indian's interest in or right to an allotment once he has acquired it. *Id.* at 845. Miller's coercive action against the Band would have fallen into neither category.

In *Keechi v. United States*, 604 F. Supp. 267 (D.D.C. 1984), also cited by Miller, the court ruled it had jurisdiction under §§ 345 and 1353 over an individual Indian's suit seeking to prevent the IRS from enforcing a levy on royalties derived from an oil and gas lease of plaintiff's allotted trust land. To the extent *Keechi* can be read to mean that §§ 345 and 1353 provide a basis for jurisdiction over any suit in which an Indian seeks to collect or preserve income derived from leases of allotted trust lands, the opinion is inconsistent with the foregoing authorities. *Keechi*, however, need not be read so broadly. The funds at issue there were not rents due under the lease of a capital improvement but royalties earned from oil production, an activity that depletes the land's resources and, thus, reduces the value of the allottee's interest in the land.

transform Miller's state-law breach of lease claim into one arising under federal law. *See Gila River Indian Community*, 626 F.2d at 714-15 (Indian tribe's claim against private parties for breach of commercial contract did not arise under federal law); *Littell v. Nakai*, 344 F.2d 486, 488 (9th Cir. 1965) (no federal jurisdiction over action by general counsel of Indian tribe against chairman of tribal council to enjoin alleged interference with counsel's performance of retainer contract, notwithstanding that contract had been authorized under federal law and approved by federal officials), *cert. denied*, 382 U.S. 986 (1966). The Band's likely federal-law defenses—sovereign immunity and lack of approval of the lease by the Secretary of the Interior— would not be part of Miller's well-pleaded complaint for breach of lease and, thus, would not support federal jurisdiction over Miller's state-law claim.[9]

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[9]In *Barona Group v. American Management & Amusement, Inc.*, 824 F.2d 710 (9th Cir. 1987), we exercised jurisdiction, without discussion, over an action in which an Indian tribe sought a declaration that a bingo management agreement was null and void under 25 U.S.C. § 81 for lack of approval by the Secretary. The tribe's claim for declaratory relief was coupled with a claim for breach of contract and damages, over which we clearly had jurisdiction. *Id.* at 714; *see* 25 U.S.C. § 81 (1982) (granting jurisdiction over action by the United States, as trustee, seeking recovery of money paid by Indian tribe pursuant to unapproved contract relative to tribe's land); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472 (1976) (under 28 U.S.C. § 1362, federal court has jurisdiction over action by tribe alleging "the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought"). We, therefore, had pendent jurisdiction over the tribe's claim for declaratory relief. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966) (defining federal pendent jurisdiction over state-law claims). Unlike the plaintiff in *Barona Group*, the Band in the present case did not allege a claim under section 81 or under any other federal law.

[12] The Band's interpleader action also anticipated a coercive action by the Board to enforce its tax levy against rent owed to Miller in the possession of the Band. The anticipated enforcement action would not arise under federal law. *See Franchise Tax Bd.*, 463 U.S. at 13 (state tax board's action to enforce levy against ERISA-covered vacation benefit plan did not arise under federal law; "federal law becomes relevant only by way of a defense to an obligation created entirely by state law"); *Neves*, 837 F.2d at 535 (interpleader action that anticipated enforcement action by state tax authority did not arise under federal law). Federal questions, *e.g.*, whether the Band is immune from a state tax levy under the federal common law doctrine of tribal sovereign immunity, would be injected into the Board's state-law action only by way of defense.

Finally, the Band's action anticipated a coercive action by the Board against Miller, for the collection of state taxes. A state's action to collect state taxes is plainly one arising under state, not federal, law. Again, federal-law issues would arise only in defense.

IV. CONCLUSION

We have concluded that jurisdiction over the Band's complaint in interpleader was improper under 28 U.S.C. § 1335, because the adverse claimants are not of diverse citizenship; improper under 25 U.S.C. § 345 and 28 U.S.C. § 1353, because Miller's right to an allotment of land is not at issue; improper under 28 U.S.C. §§ 2201-2202, because those sections do not grant jurisdiction to the district courts; and improper under 28 U.S.C. §§ 1331 and 1362, because the Band's well-pleaded complaint alleges

no claim under federal law and the coercive actions anticipated by the Band's complaint would arise under state law. Accordingly, the district court had no subject matter over the Band's action. The district court's judgment in this action is VACATED and the matter is REMANDED with instructions that it be DISMISSED for lack of jurisdiction. On dismissal of the action, the funds deposited into the district court's registry by the Band shall be returned to the Band. The parties shall bear their own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MORONGO BAND OF MISSION INDIANS AND JUSTUS MANAGEMENT COMPANY OF CALIFORNIA, INC., Plaintiffs, v. CALIFORNIA STATE BOARD OF EQUALIZATION, et al., Defendants.	No. C 83 6190 SC ORDER RE MOTIONS FOR SUMMARY JUDGMENT (Filed April 24, 1987)

This case is before the court on plaintiff Morongo Band of Mission Indians' ("Band") and Defendants California State Board of Equalization's ("Board") and Clive Miller's ("Miller") cross motions for summary judgment. The Board and Miller have agreed to a settlement between themselves. Thus, their interests are the same for the purposes of this motion.

The facts are not in dispute. The Band is a federally recognized Indian Tribe. It is the beneficial owner of the unallotted trust lands within the exterior boundaries of the Morongo Indian Reservation ("the Reservation"). Defendant Miller is a member of the Band. He is the beneficial owner of a parcel of allotted trust land within the boundaries of the Reservation. There is a large building suitable for use as a bingo hall on Miller's land.

In April 1983, the Band enacted a tribal ordinance to regulate the operation of and participation in bingo and related games on the Reservation. It also established the Morongo Tribal Bingo Enterprises. In the same referendum, the Band approved the execution of two agreements which would implement the Tribal Bingo Enterprises: (1) a bingo management agreement between Band and plaintiff Management Company of California, Inc. ("Justus") under which Justus would provide the capital and management expertise for operating the Bingo enterprise; and (2) a lease between the Band and Miller for the use of Miller's land on which stood the bingo hall and appurtenant facilities. Article three of the lease states that it is subject to the approval of the Secretary of the Interior ("Secretary").

Both the management agreement and the lease were executed on or about April 26, 1983. At about the same time, Miller and Walter Justus executed a separate joint venture agreement which gave Miller a right to participate in and financially benefit from Justus' management of the Band's bingo enterprise. The Secretary never approved the management agreement, lease, or joint venture.

The bingo enterprise began operating under Justus' management on Miller's land on or about April 30, 1983, and continued until February 1984.

During May, June, July, and August of 1983, the Band paid Miller $73,000 per month for the use of his allotment. On August 16, 1983, the Board served a Notice of levy upon the Band and Justus which levied:

> All monies, debts, credits and other personal property belonging to the above named [Miller], and more spe-

> cifically, but not limited to, monies being held as rental. This levy is effective for a period of one year. You must continue to withhold all payments to the above referenced taxpayer and remit them to this office no later than 10 days after the due date.

According to the notice of levy, the total amount to be paid over to the Board was $617,312.11. In December 1983, the Band and Justus, as the Band's agent and custodian of the funds of the Band's bingo enterprise, paid $292,000.00 into the registry of the court, and filed this action.

The Band never consented to either the Board's levy or suit by Miller for rent, damages, or other relief.

Summary judgment is proper only when there is no genuine issue of material fact or when, viewing the evidence in the light most favorable to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985). Once a summary judgment motion is made and properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Myrtle Nell Catrett*, 477 U.S. —, 91 L.Ed.2d 265 (1986).

The Band claims that it is entitled to summary judgment because the lease is not valid. Plaintiff's memorandum in support of motion for summary judgment ("Plaintiff's memorandum") pp. 13-14. The Band argues the lease is not valid because it was not approved by the Secretary in accordance with 25 U.S.C. § 415 and its own terms. *Id.* The Band further asks that Miller's counterclaim be

dismissed. The Band argues that its status as a sovereign tribe prevents Miller from counterclaiming against it. *Id.* pp. 16-19. The Band argues that none of Miller's counterclaims can be characterized as a claim for recoupment. *Id.* pp. 17, 18. Defendants make a cross motion for summery judgment. They argue that 25 U.S.C. § 415 does not apply to the lease. State Board of Equalization memorandum in support of cross motion for summary judgment ("Board memorandum") pp. 7-10. They also argue that Miller's counterclaim can validly be characterized as a claim for equitable recoupment. Miller memorandum in opposition to plaintiff's motion for summary judgment ("Miller memorandum") pp. 16-17.

The preamble to the lease states that it is governed by the provisions of 25 U.S. § 415. Complaint, Exhibit B. 25 U.S.C. § 415 provides that "any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior . . ." Accordingly, Article 3 of the lease states that it is subject to the approval of the Secretary. Complaint, Exhibit B. Therefore, in order for the lease to be valid, it must be approved by the Secretary.

The Secretary never approved the lease. Robert Martin Declaration, p. 4. Thus, it is not a binding agreement and plaintiff is not liable under it for rent.

Recoupment is a demand arising from the same transaction as the plaintiff's claim. 3 Moore, *Federal Practice*, ¶ 13.02 at 13-13, n. 1 (2d ed. 1985). The doctrine of recoupment provides that

> when the sovereign sues it waives immunity as to claims of the defendant which assert matters in re-

> coupment—arising out of the same transaction or occurrence which is the subject matter of the government's suit, and to the extent of defeating the government's claim but not to the extent of a judgment against the government which is affirmative in the sense of involving relief different in kind or nature to that sought by the government or in the sense of exceeding the amount of the government's claims; but the sovereign does not waive immunity as to claims which do not meet the "same transaction or occurrence test" nor to claims of a different form or nature than that sought by it as plaintiff nor to claims exceeding in amount that sought by it as plaintiff.

Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1344 (10th Cir. 1982), *citing Frederick v. United States,* 386 F.2d 481, 488 (5th Cir.) 1967. Equitable recoupment is applicable to Indian tribes. *Jicarilla Apache Tribe,* 687 F.2d at 1344.

The court finds that Miller's counterclaim arises out of the same transaction or occurrence as plaintiff's case. The parties are arguing over who owns the $292,000 plaintiff deposited into the court because of defendant Board's notice of levy. The Band itself described this money as representing "the amounts due and payable to defendant CLIVE MILLER for the lease [by the Band] of his land from the date of service of the Levy by the State Board of Equalization upon the plaintiffs herein until the present." Notice of Deposit dated December 23, 1983 (capitalization in the original).

Thus, the court grants Miller summary judgment on his counterclaim for the reasonable value of the use of his trust allotment. The court finds this amount to be $292,000. $292,000 represents four months' rent, or the months of September, October, November, and December of 1983. Al-

though the lease is not valid because the Secretary did not approve it, the parties negotiated its terms. The court finds nothing to suggest that the parties did and do not believe the leased property was worth $73,000 per month.

In accordance with the foregoing, the court orders that:

(1) plaintiff's motion for summary judgment on the issue of the validity of the lease is granted;

(2) plaintiff's motion to dismiss Miller's counterclaims is denied; and

(3) defendants Board's and Miller's motion for summary judgment on Miller's counterclaim for the reasonable value of the use of his trust allotment is granted in the amount of $292,000.

Dated: March 23, 1987.

/s/ Samuel Conti
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MORONGO BAND OF MISSION INDIANS AND JUSTUS COMPANY OF CALIFORNIA, INC.,	)	No. C 83 6190 SC
Plaintiffs,	)	JUDGMENT
v.	)	(Filed March 24, 1987)
CALIFORNIA STATE BOARD OF EQUALIZATION, et al.,	)	
Defendants.	)	

In accordance with the order entered by the court herein, it is hereby ordered, adjudged and decreed that:

(1) plaintiff's motion for summary judgment on the issue of the validity of the lease is granted;

(2) plaintiff's motion to dismiss Miller's counterclaims is denied; and

(3) defendants Board's and Miller's motion for summary judgment on Miller's counterclaim for the reasonable value of the use of his trust allotment is granted in the amount of $292,000, and this action is dismissed.

Dated: March 23, 1987.

/s/ Samuel Conti
United States District Judge